90-1754

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES DEEDS,

Petitioner,

v.

JOE JOHNSON, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

David T. Lopez
David T. Lopez & Assoc.
3900 Montrose Blvd.
Houston, Texas 77006

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Allegedly harassed because of comments on matters of public interest, a public employee found his conditions of work intolerable and submitted his resignation. He sued alleging constructive discharge less than two years before his discharge, but two years and nine days after giving notice of his resignation. Did the courts below err in holding that the cause of action accrued, according to the applicable statute of limitations, on the day the employee gave notice, not on the day his employment was terminated?

THE PARTIES TO THIS PROCEEDING

Charles A. Deeds

Joe Johnson

Aubrey La Fargue

Al Pliodzinskas

All of the above are present or former employees of The City of Houston, a municipality.

The City of Houston.

TABLE OF CONTENTS

	Page
Question Presented for Review.....	i
The Parties to this Proceeding....	ii
Table of Contents.....	iii
Table of Authorities.....	iv
The Opinions Below.....	1
Jurisdiction of this Court.....	1
Statutes and Rules.....	1
Statement of the Case.....	4
Argument.....	6

TABLE OF AUTHORITIES

Page

Cases

Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979)..... 9

Centifax v. Nix, 865 F.2d 1422, 1433 (4th Cir. 1989)..... 8

Delaware State College v. Ricks, 449 U.S. 250 (1980)..... 6,8,9, 10

Constitution and Statutes

First Amendment to the United States Constitution..... 1,2

Civil Rights Act of 1871, 42 U.S.C. § 1983..... 1,2

28 U.S.C. § 1254(1)..... 1

Texas Civil Practice and Remedies Code § 16.003..... 3

THE OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Texas were not reported. They are reproduced in the Appendix.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered February 7, 1991. The jurisdiction of this court is invoked in accordance with 28 U.S.C. § 1254(1).

STATUTES AND RULES

This case was brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 asserting violations of rights secured by the First Amendment to the Constitution of the United States.

The First Amendment to the Constitution of the United States states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprива-

tion of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The applicable limitations statute, Texas Civil Practice and Remedies Code § 16.003 states as follows:

(a) A person must bring a suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible

entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

STATEMENT OF THE CASE

Charles A. Deeds, hereinafter referred to as "the employee" for clarity, was a chemist employed by the City of Houston.

His federal suit, filed June 20, 1989, alleged he had raised complaints about falsification of data which could create health hazards and had given notice of public employees falsifying time re-

cords to get pay to which they were not entitled.

The employee further alleged that beginning early in 1986, as a result of his reporting the misdeeds, he was subjected by his supervisors to continuing harassment. The supervisors and the municipality were named as defendants in the lawsuit, in which the employee claimed constructive discharge.

The employee submitted a letter of resignation on June 11, 1987, stating that he was being subjected to retaliation for his actions, had not been able to obtain relief through the municipal grievance procedure and was forced to resign effective July 1, 1987.

The suit, thus, was brought less than two years from the undisputed date of the discharge, July 1, but more than two years

after the day the employee gave notice of continuing acts of harassment and his resignation.

The district court granted summary judgment, holding that the Texas two-year statute of limitations, which the parties agreed does apply, accrued on the date of the notice, not of the discharge. The appellate court affirmed.

ARGUMENT

Holding that a cause of action for an injury accrues on the basis of action by the victim, not of the alleged wrongdoer, is a gross misapplication of the principles set forth in Delaware State College v. Ricks, 449 U.S. 250 (1980).

Where there is a continuing injury, a cause of action accrues on each successive day of such injury. The Fifth Circuit refused to distinguish between a case

in which the employer tells an employee he is discharged and the case here, where there is a persistent pattern of conduct culminating in the constructive discharge.

The Fifth Circuit held that "the statute of limitations began to run from the date that Deeds notified his employer of his resignation on June 11, 1987, not on the last day of work, irrespective of continuing wrongful acts of the employer between those dates." Appendix at 5-6. (Emphasis added.)

Summary judgment was rendered solely on the limitations issue. Thus it was never contested that the defendants continued their wrongful conduct to the last day the employee worked. Nor was it contested that the conduct made further employment intolerable.

In effect, the decisions below to punish the employee for the final courtesy of providing notice, rather than walking away, while choosing to ignore wrongful conduct admittedly occurring within the limitations period.

Other circuits have taken a different view of a continuing violation. See, for example, Centifanti v. Nix, 865 F.2d 1422, 1433 (4th Cir. 1989)("[Plaintiff] alleges what is in essence a continuing wrong. His cause of action continues to accrue on each day of the alleged wrong.")

The decision below, in fact, is inconsistent with this court's analysis in Delaware College, supra. In that case, the employer had given specific notice that a professor would be denied tenure, and the cause of action was held to accrue as a result of the denial of tenure, even

though the termination of employment, in accordance with academic practice, was not immediate.

Quoting from Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979), this court noted "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." 449 U.S. at 258. Significantly, in Abramson a tenure denial was held not to constitute the accrual of a cause of action for purposes of limitations where the circumstances indicated a practice of reconsideration. The denial of reconsideration was held to be a separate allegation of wrongful conduct which precluded summary judgment.

In Delaware College, this court held that in order to extend the limitations

period from the time of notice, the employee "should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of employment." 449 U.S. at 257.

The principles of Delaware College thus cannot be squared with the Fifth Circuit's holding that the continuation of the wrongful conduct after the submission of the resignation was of no consequence.

The importance of this case goes beyond the demonstrated inconsistency with other circuits and this court. Holding that a cause of action accrues from the action of the victim, not the wrongdoer, overturns well established legal principles and creates unnecessary confusion. If the operative act in a constructive

discharge case is the employee's subjective knowledge of the ultimate consequences, the line is not drawn by notice of resignation. The action accrues when the employee first knew the cumulative effect of the wrongful conduct was or would be intolerable.

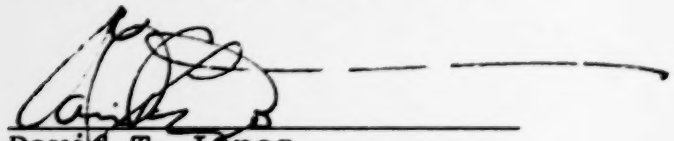
What of an employee who realized that his employer would force him to leave months before the employee actually walked off the job? What scale should a court use to weigh the final straw? What happens if an employee tells his employer that if he does not cease his harassment the employee will be forced to leave? Is the employee then required to leave or to sue within the limitations period if the employer does not stop the harassment?

Failing to give predominant consideration to Constitutional principles, and

allowing individual rights to be denied because of procedural traps which defy established precedent and plain common sense, threatens the credibility of the entire federal judiciary.

This case must be granted plenary review and the error below corrected.

Respectfully submitted,



David T. Lopez
Attorney for Petitioner
3900 Montrose Boulevard
Houston, Texas 77006
Telephone: 713-523-3900

OF COUNSEL:

DAVID T. LOPEZ & ASSOC.

\SUPCT\SDEEDS01.PET

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-2591

Charles A. Deeds

Plaintiff-Appellant,

versus

Joe Johnson, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA H 89 2107)

(February 7, 1991)

Before Johnson, Duhe, and Wiener, Circuit Judges.

Per Curiam:*

Local rule 47.6 provides that "in the

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

case of summary judgment, [when] no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed without opinion." Pursuant to that Rule, this court affirms the judgment of the district court granting the defendants' motion for summary judgment and dismissing the plaintiff's claim as time-barred. We attach as an appendix to this opinion the order of the district court granting the defendants' motion for summary judgment.

Although we are affirming for the reasons expressed by the district court, we note our disagreement with the way that plaintiff-appellant, Deeds, construed the

district court's opinion. The district court wrote, "plaintiff has failed to allege any discrete acts of discrimination after June 11, 198[7] that would toll the statute of limitations." Deeds complained on appeal that the district court's conclusion "is on its face erroneous as to the facts," and that he had in fact alleged discriminatory acts continuing after June 11, 1987.

That portion of the district court's opinion can be read one of several ways, neither of which requires its reversal. The district court could have meant that

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2 The district court's order indicates in two separate places that Deeds' letter of resignation was dated June 11, 1985. The order also indicates the correct date of the letter, June 11, 1987, in three separate places. This court is of the opinion that the June 11, 1985, references were inadvertent errors and that the district court was not operating under the erroneous belief as to the date of the resignation letter.

the facts that Deeds alleged did not constitute, as a matter of law, continuing discriminatory acts, and thus not acts that would toll the statute of limitations." Or, the district court could have meant that Deeds allegations of discriminatory acts after June 11, 1987, were insufficient to raise a fact question. Even more plausibly, the district court could have meant that, despite the allegations of continuing discriminatory acts after June 11, 1987, the statute of limitations began to run on June 11, 1987, when Deeds delivered his resignation, not on July 1, 1987, the last day of his employment. Thus, the allegations of continuing employment, which were the same type of acts complained of in his resignation letter, were not acts "that would toll the

running of the statute of limitations." The latter reading of the district court's opinion is clearly supported by the Supreme Court's holding in **Delaware State College v. Ricks,** 449 U.S. 250, 257-58 (1980) (holding that the limitations period commenced when the denial of tenure was communicated to the plaintiff, and not on the final day of employment). **See also Stark v. Dynascan Corp.**, 902 F.2d 549, 551 (7th Cir. 1990) (noting that the limitations period "begins to run from the date that the employee is notified of termination, not from the later date when termination actually occurs"). The same principles apply in a constructive discharge case. Thus, the statute of limitations began to run from the date that Deeds notified his employer of his resignation on June 11, 1987, not on the last

day of work, irrespective of continuing wrongful acts of the employer between those dates.

For the foregoing reasons the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES A. DEEDS,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-89-2107
JOE JOHNSON, ET AL.	§	
Defendants.	§	

ORDER

Pending before the Court in the above referenced cause, grounded in 42 U.S.C. sections 1983, 1985, 1986 and 1988 and in the first and fourteenth amendments, are the following motions:

(1) Defendants Aubrey LaFargue and Al Pliodzinska's motion to dismiss or for summary judgment because the suit is barred by limitations;

(2) Defendant City of Houston's motion to dismiss for defective service under Rule 4(d)(6), Fed. R. Civ. P.;

(3) Defendant City of Houston's motion to dismiss or, alterna-

tively, for summary judgment based upon

a. failure of Plaintiff to plead with particularity a policy made by a policy-making official;

b. a limitations bar; and

c. sovereign immunity from pendent state law claims.

Plaintiff filed this action on June 20, 1989. Because Plaintiff has cured his defective service on the City, the Court finds the second motion is moot. However, after reviewing the record and the applicable law, the Court concludes that this suit is time-barred. Accordingly, the Court concludes that Defendants' motions for summary judgment should be granted.

Plaintiff claims that beginning in 1985 when he was working as a chemist for the City of Houston, he openly cirticized

violations of city procedures and policies and falsification of data, all issues of significant public concern. In retaliation he was transferred against his will and harassed at work by Defendants Pliodzinska and LaFargue, ultimately resulting in his constructive discharge. On June 11, 1985, he wrote a resignation memo to Defendnat Pliodzinskas. Plaintiff characterizes his discriminatory treatment as a continuing violation from early 1986 through June 1987, and he contends that his resignation, a constructive discharge, became effective on July 1, 1987, triggering the running of the statute of limitations at that time. Under his reasoning, he brought suit ten days before limitations expired.

Defendants submit that Plaintiff's cause of action accrued on June 11, 1987,

the date of his resignation memo, and thus he missed the filing deadline by nine days. Plaintiff has not alleged any acts of discriminatory conduct by Defendants after June 11, 1987. Although given an opportunity to counter their arguments, Plaintiff, insisting that the statute should not run until after his last day at work, responded,

> Although the motion is denominated one to dismiss, and alternatively for summary judgment, it is clear that it must be decided under Rule 56, Fed. R. Civ. P., since materials outside the pleadings are submitted with the motion.
>
> However, it is not necessary for plaintiff to offer responsive affidavits or other summary judgment evidence, since on the basis of defendants' own submission the motion is patently without merit.

The Court disagrees. In section 1983 actions, the Court must look to state law

for the applicable statute of limitations, here a two-year period under section 16.003, Texas Civil Practices and Remedies Code. Nevertheless, the question of when a federal cause of action accrues is a matter of federal law. A cause of action under the Civil Rights Act of 1871 accrues when the plaintiff knows or has reason to know of the injury that forms the basis of his suit. Kline v. North Texas University, 782 F.2d 1229, 1232 (5th Cir. 1986); Lavellee v. Listi, 611 F.2d 1129, 1130 (5th Cir. 1980). Under this standard, Plaintiff clearly knew of the nature of his claims, harassment and constructive discharge, at the time when he wrote his resignation memo, dated June 11, 1987. In Delaware State College v. Ricks, 449 U.S. 250 (1980), the United States Supreme Court rejected a brightline, last-day of

work rule for triggering a limitations period in a Title VII and section 1981 employment discrimination case. Instead the Court looked to the date when the allegedly discriminatory decision to terminate was conveyed to the employee by definite notice, the day when defendants "established [their] official position and made that position apparent to" plaintiff. Id. at 262. See also Economu v. Borg-Warner Corp., 829 F.2d 311 (2nd Cir. 1987). In a constructive discharge case, where the employee's act terminates his own employment, the focus is on what a reasonably prudent employee knew and when it became apparent to him. Economu, 829 F.2d at 315; Budzius v. Robert Bosch Corp., 1989 WL 152834 (N.D. Ill Nov. 17, 1989); see also Dumas v. Town of Mount Vernon, 612 F.2d 974, 978 (5th Cir. 1980).

To give a plaintiff control over the limitations period for filing by permitting him the discretion to select the date when his resignation would become effective, i.e. his final work day, and thus prolong the filing period under a constructive discharge theory, is contrary to the purposes underlying a limitations bar.

The continuing violation theory requires a pliaintiff to show a series of related acts, at least one of which falls within the limitations period. Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 979 (5th Cir. 1983). Plaintiff has failed to allege any discrete acts of discrimination after June 11, 1985 that would toll the running of the statute of limitations. Accordingly the Court finds that this action is time-barred. The

Court therefore

ORDERS that Defendants' motions for summary judgment are GRANTED.

SIGNED this 4th day of May, 1990, at Houston, Texas.

(James DeAnda)
CHIEF JUDGE
UNITED STATES
DISTRICT COURT